IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-623

IN THE MATTER OF THE ESTATE OF
BETTY R. EISENBERG, DECEASED:

ALVIN H. EISENBERG, CO-PERSONAL
REPRESENTATIVE OF THE ESTATE,

Appellant

v.

JACK M. EISENBERG,
SURVIVING SPOUSE,

Appellee

MOTION TO DISMISS OR AFFIRM

JACKSON M. BRUCE, JR.
THEODORE F. ZIMMER
PAUL J. TILLEMAN
780 North Water Street
Milwaukee, Wisconsin 53202
(414) 277-5000
Counsel for Appellee

November 8, 1979

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The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the order of The Wisconsin Supreme Court dated July 17, 1979, denying Appellant's petition for review of the decision of the Wisconsin Court of Appeals, District 1, in *In Matter of Estate of Eisenberg*, 90 Wis.2d 260, 280 N.W. 2d 359 (Wis.App. 1979), on the grounds that no substantial federal question is presented or that the Wisconsin courts below have adequately disposed of the federal questions presented.

INTRODUCTORY STATEMENT

Appellee is co-personal representative of the above-captioned estate, the husband of the decedent, Betty R. Eisenberg, and the father of the Appellant. In this case the Appellant asks the Court to resolve a dispute between father and son regarding entitlement to the assets of the estate of their deceased wife and mother respectively. Although the Appellant has couched his arguments in terms of a federal constitutional challenge to Wisconsin spousal election statutes, the question is without federal significance.

In support of his appeal, Appellant urges this Court to consider two questions:

1. Do Wisconsin Statutes §§861.05(1) and 861.33(1) deprive the decedent, Betty R. Eisenberg of liberty or property without due process of law under the Fourteenth Amendment of the U.S. Constitution?

2. Do said statutes violate the equal protection clause of the Fourteenth Amendment since they apply only to married person?

Appellant's discussion of these straightforward questions is a melange of bits and pieces of unrelated and conflicting federal and Wisconsin constitutional jurisprudence, by means of which he seeks to manufacture a substantial federal question worthy of plenary examination by this Court.[1]

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[1]In reviewing the questions presented by Appellant, certain collateral points may be eliminated:

i. The facts stated at pages 10-11 of Appellant's Jurisdictional Statement are disputed, but are not in any event relevant. *See,* Court of Appeals decision (App. of Appellant p. 8); said decision (App. of Appellant p. 3) sets out the material facts;

(Footnote continued on following page)

THE RIGHT TO MAKE A WILL UNDER WISCONSIN LAW IS NOT "FUNDAMENTAL" FOR PURPOSES OF THE FOURTEENTH AMENDMENT

Wisconsin, unlike the other states, grants protection to the right to make a will under its constitution. However, as Appellant has intentionally failed to point out in his jurisdictional statement, the right to make a will in Wisconsin is, and has always been from the moment of formulation of the rule, *expressly* subject to reasonable legislative regulation, specifically of the type here involved. In *Nunnemacher v. State,* 129 Wis. 190, 108 N.W. 627 (1906), the case generally recognized as first enunciating the constitutional stature of the right to make a will in Wisconsin, the Wisconsin Supreme Court described the right as follows:

> "[The constitutional right to make a will is] *subject to reasonable regulation by the legislature;* lines of descent may be prescribed, the persons who can take as heirs or devisees may be limited, collateral relatives may doubtless be included or cut off, the manner of the execution of wills may be prescribed,

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(Footnote 1 continued)

ii. Wisconsin's present election right is still defined as "dower", Wis. Stats. §861.03 (1977), and the only change of substance made in these laws in the last 100 years was to provide equality of treatment for men and women in 1969. The pre-1969 statutes provide an elective right for women against *both* real and *personal* property, Wis. Stats. §233.14 (1969) and have done so since 1877, long before the articulation of the Wisconsin doctrine of the right to make a will.

iii. Spouses can, and always could, provide for a bar of elective rights by contract, Wis. Stats. §861.07 (1977), and are not limited to the methods described at pages 22-23 of Appellant's Jurisdictional Statement.

iv. Contrary to Appellant's assertion, the operation of the Wisconsin spouse election statutes does not reduce the residuary share by more than one-third.

> and there may be much room for legislative action in determining how much property shall be exempted entirely from the power to will, so that dependents may not be entirely cut off. These are all matters within the field of regulation."

The legislature's right to reasonably regulate the right to make a will has been continuously re-affirmed by the Wisconsin Supreme Court. The Wisconsin Supreme Court has never characterized the right to make a will under the Wisconsin Constitution as being absolute in the sense stated in Appellant's Jurisdictional Statement. As recently as 1973, the Wisconsin Supreme Court reaffirmed that reasonable regulation of the right to make a will includes "the right of a widow to renounce the provisions of the will by accepting her statutory rights of dower." *Estate of Schmalz,* 58 Wis. 2d 220, 230, 206 N.W. 2d 141, 146 (1973) quoting from *Estate of Wilkins,* 192 Wis. 111, 113 (1927). Reasonable legislative regulation has *always* been an integral part of the right itself and the Wisconsin Supreme Court has never invalidated a statute as unreasonably regulating the right.

The Appellant's jurisdictional statement ignores this critical aspect of the right to make a will in his attempt to characterize the right as "fundamental" for purposes of his Fourteenth Amendment due process and equal protection challenges to Wisconsin's spousal election statutes. Appellant cites *Board of Regents v. Roth,* 408 U.S. 564 (1972), for the rule that the Fourteenth Amendment protects property rights created by state law, in that instance a university teaching contract. Appellant leaps from that general rule to the unsupported proposition that because Wisconsin regards the right to make a will as "sacred and fundamental" for purposes of *its* constitution, that characterization automatically carries over and is binding upon this Court in the context of a federal constitutional challenge. This is not and cannot be the case. *See San Antonio School District v. Rodriquez,* 411 U.S. 1, 31 (1973).

The question of the "fundamental" stature of Wisconsin's right to make a will under the Fourteenth Amendment must be resolved in terms of federal constitutional law, and this Court has held that the right to make a will is not guaranteed by the United States Constitution. *Demorest v. City Bank Farmers Trust Co.,* 321 U.S. 36 (1944). The Wisconsin Court of Appeals expressly recognized this basic difference in approach when it considered the merits of Appellant's federal constitutional arguments. *In Matter of Estate of Eisenberg, supra* at 627-28, 629-630. If the Wisconsin legislature abolished the right to make a will tomorrow, its actions would not run afoul of any provision of the United States Constitution. This Court has consistently held that a state legislature may, without violating the federal constitution, completely abolish the right to make a will. The Wisconsin legislature's action in abolishing the right to make a will would run afoul of the Wisconsin constitution, but that is a matter of Wisconsin, not federal, law.

Appellant argues, however, that because Wisconsin grants protection to the right to make a will under its constitution rather than by statute, the present case is distinguishable from *Demorest.* This distinction, however, is not one of substance. The mere fact that a state-created right stems from the state constitution rather than state statutory or common law has no bearing on its status under the United States Constitution. For Fourteenth Amendment purposes, federal judicial analysis of the validity of the Wisconsin spousal election statutes, specifically found by the Wisconsin courts below to be valid limitations on the right to make a will under Wisconsin law, is no different from the analysis that would be applied to a challenge to the spousal election statutes of a sister state that granted its citizens the right to make a will by statute rather than constitution. To hold otherwise would allow one state to gain advantage over other states by virtue of *ex parte* action.

This basic difference in approach and scope between the Wisconsin and United States Constitutions has been recognized before. For example, in *San Antonio School Board v. Rodriquez, supra,* this Court expressly refused to characterize the right to education as "fundamental" for purposes of the equal

protection clause of the Fourteenth Amendment. Three years later, however, in *Buse v. Smith,* 74 Wis.2d 550, 247 N.W.2d 141 (1976), the Wisconsin Supreme Court held that the right to education is a fundamental right guaranteed by the Wisconsin Constitution and subjected a Wisconsin statute adversely affecting that right to strict judicial scrutiny. The Wisconsin position is directly opposite to that of this Court in *Rodriquez* and was expressly recognized as such by the Wisconsin Supreme Court. *Buse, supra* at 564.

When Wisconsin's right to make a will is placed in its proper federal constitutional perspective, the lynch pin of Appellant's challenge to Wisconsin's spousal election statutes under the due process and equal protection clauses of the Fourteenth Amendment disappears.[2]

THE CHALLENGED STATUTES DO NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The Fourteenth Amendment to the United States Constitution prevents a state from depriving its citizens of property or liberty without due process of law. The Wisconsin spousal election statutes did not deprive the decedent, Betty R. Eisenberg, of either a property or a liberty interest. Under a line of Wisconsin cases starting with *Nunnemacher v. State, supra,* Betty R. Eisenberg's right was only to make a will *subject to reasonable legislative regulation,* no more, no less. Her right was always limited by the Wisconsin legislature's corresponding right to reasonably regulate it. The legislature, in enacting the challenged statutes, properly exercised this right. Each Wisconsin court that has considered this case has determined, as a matter of Wisconsin law, that the legislature acted reasonably and within the scope of its power in adopting these statutes. Consequently, Betty R. Eisenberg was deprived of nothing whatsoever by the enactment of §§861.05(1) and 861.33(1).

[2]In fact, most of Appellant's substantive arguments are devoted to his objections to the reasoning of the Wisconsin Court of Appeals' in support of its holding that the challenged statutes do not violate the *Wisconsin* constitution. This reasoning, however, relates only to Wisconsin law and has no direct bearing on Appellant's Fourteenth Amendment arguments.

THE CHALLENGED STATUTES DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Appellant argues that because the challenged statutes apply only to married persons, they violate the equal protection clause of the Fourteenth Amendment and must be subjected to strict judicial scrutiny. This Court has consistently held, however, that:

> "Equal protection analysis requires strict scrutiny of a legislative classification only when the classification interferes with the exercise of a fundamental right or operates to the disadvantage of a suspect class."

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). The strict scrutiny doctrine is a judicially created test developed long after Wisconsin characterized its limited right to make a will, subject to reasonable legislative regulation, as "fundamental". That Wisconsin's right to make a will subject to reasonable legislative regulation is not "fundamental" in the federal sense is clear from even a cursory comparison to the rights which this Court has so characterized. Instead the right to make a will under the state law (whether created by the constitution, the statutes or the case law of a particular state) is an economic right of the sort traditionally accorded rational basis treatment by this Court.

The Wisconsin Court of Appeals applied a strict scrutiny test in analysing the validity of the Wisconsin statutes under the Wisconsin constitution. They did so because the right in question is declared by Wisconsin case law to be "sacred and fundamental". As discussed above, such determination does not control the applicable test for federal purposes. The determination of the degree of protection and the level of judicial scrutiny to be applied is a federal one. To hold otherwise would subvert

the federal constitution by allowing each state to declare which of its created rights were fundamental, and therefore entitled to the highest degree of federal protection usually reserved for the political and private personal rights guaranteed by the First Amendment.[3] In *Demorest* this Court implicitly held that the right to make a will is not an inherent, fundamental, human right. It is simply an economic privilege, a state-created incident of property ownership, which state legislatures are free to abolish or restrict as they deem appropriate.

Similarly, the challenged statutes do not operate to the disadvantage to a suspect class of persons. This Court has never held that a classification based on marital status is "suspect." *Eisenstadt v. Baird,* 405, U.S. 438 (1972) involved a federal constitutional challenge to a statute limiting the availability of contraceptives to married persons. The statute was subjected to close scrutiny because it infringed upon fundamental, human rights regarding procreation and sexual activity, not because marital status was "suspect."

A suspect class is one "saddled with such disabilities or subjected to such a history of purposefully unequal treatment, or relegated to such position of political powerlessness as to warrant extraordinary protection from the majoritarian political process." *San Antonio School District v. Rodriquez, supra.* Countless statutes and laws, state and federal, of every sort and description make distinctions between the married and the unmarried but married persons have never been the subject of invideous discrimination in this country. Marriage is a voluntary status unlike race, creed, color, sex or national origin and

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[3]The corrollary to Appellant's contention demonstrates its absurdity: If a state characterized a right as non-fundamental under *its* constitution, then such characterization would automatically determine the federal test to be applied. Thus, the right to personal freedom regarding procreation might be characterized by State X as "non-fundamental" and therefore any statutory restriction of that right would not be subject to federal strict scrutiny. Similarly, State Y might elevate the issuance of a hunting license to a "fundamental" right thereby forcing federal courts to invalidate all restrictions on such right that were not narrowly drawn to promote only compelling state interests.

the married are certainly not an unrepresented minority. In fact, married individuals make up 68% of the persons entitled to vote in this country. *United States Bureau of the Census, Statistical Abstract of the United States: 1978* at 40. To assert that married citizens of Wisconsin do not have the political power to control the type of regulations that affect their testamentary rights, is absurd.

Since the challenged statutes do not affect a fundamental right or operate to the detriment of a suspect class, the proper test to be applied in considering a challenge to the statutes under the equal protection clause of the Fourteenth Amendment is the rationale basis test. The rationale basis test was described by this Court in *Massachusetts Board of Retirement v. Murgia, supra* at 314 as:

> "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary."

Similarly in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976) the Court stated:

> "A statutory classification impinging on no fundamental interests, and especially one dealing only with economic matters, need not be drawn so as to fit with precision the legitimate purposes animating it. . . . That [a state] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional."

The analysis of the Wisconsin Court of Appeals in its opinion below, clearly demonstrates that the challenged statutes meet the rationale basis test, and in fact, for purposes of the

Wisconsin Constitution meet the more stringent strict scrutiny test.

CONCLUSION

For the reasons set forth above, Appellee respectfully requests that the Court dismiss this appeal or, in the alternative, affirm the order of the Wisconsin Supreme Court dated July 17, 1979.

Respectfully submitted,

JACKSON M. BRUCE, JR.
THEODORE F. ZIMMER
PAUL J. TILLEMAN
780 North Water Street
Milwaukee, Wisconsin 53202
(414) 277-5000
Counsel for Appellee